

SPECIAL TRUSTEE

HEARING

BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

THE ROLE OF THE SPECIAL TRUSTEE WITHIN THE DEPARTMENT OF
THE INTERIOR

SEPTEMBER 24, 2002
WASHINGTON, DC



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SPECIAL TRUSTEE

TUESDAY, SEPTEMBER 24, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (vice chairman of the committee) presiding.

Present: Senators Campbell and McCain.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. The Committee on Indian Affairs will be in session.

Senator Inouye is detained this morning and has asked me to go ahead and start the hearing, which I'm happy to do. We have just three witnesses. We're told we have a vote starting at 10:30. I'll try and get through all of the testimony and perhaps a few questions before we start, but we may have to recess and reconvene after the single vote that we're going to have.

Last week, Judge Lamberth handed down a contempt finding against the Secretary and Assistant Secretary. With just a few days left in this session, frankly I don't know what lies ahead of us, what we can accomplish this year or what we have to restart next year. I have to say, as I've said a number of times in the past, I'm sorry that the Secretary and Assistant Secretary inherited something that's been going on for a number of years. I know them both very well as friends and as professional colleagues, too, and I know that in the past both of them have done their very best to try to help Indian America. But that's something that we have to face.

Our collective experience with the Special Trustee for Indian Affairs since the enactment of the 1994 Trust Reform Management Act has not been very good. I continue to hope it's going to get better, but at this point, it doesn't seem to be. Spanning both Democratic and Republican administrations, each trustee has expressed dissatisfaction with the pace and the direction of the trust reform effort in his respective Interior Department. To be candid, I think we need to answer a number of fundamental questions that seem to keep rolling around that we haven't found the answer to yet. One is what progress in trust reform has been made and what we can rely on for future legislative and funding initiatives. As you

know, the task force has met a number of times and has given us some ideas. They've agreed on a number of areas and initiatives, and they're still pretty much dug in and locked out on several others.

Two, we should ask what Congress continues to do to rely on the Special Trustee to be the main actor in carrying out the initiatives. And three, if it should, what changes do we need to make to the 1994 Act and if the trustee is not going to be the principal actor in trust reform how should we proceed and what will take place and what would be the function of the trustee.

We'll start with the first gentleman, that will be James Cason, the Association Deputy Secretary of the Interior. If you would go ahead, Jim.

**STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY
SECRETARY OF THE INTERIOR**

Mr. CASON. Mr. Chairman, I have a short statement that I wanted to have entered into the record.

Senator CAMPBELL. Without objection, that will be included in the record.

Mr. CASON. And I just have a very brief comment. You had started to talk about the efforts that we've been making with the Tribal Task Force. We had worked with the Indian community to select two regional representatives from each BIA region, a total of 24 plus alternates, to sit down and talk about a number of issues affecting how the Department of Interior managed its Indian trust responsibilities.

We've had ongoing negotiations or discussions with the Task Force for about 8 months now. And as you said, there are a number of items upon which we agree and a number of items which we haven't agreed upon yet. We have another meeting scheduled for this Thursday. We're going to talk to the Task Force and see if we can move forward on the agenda of the Task Force. And we plan to keep the committee informed about our progress and what the implications are to the BIA and to OST and how we manage trust reform within the Department.

Thank you. So I'm here to answer questions.

[Prepared statement of Mr. Cason appears in appendix.]

Senator CAMPBELL. Thank you. I appreciate that. Would you stay at the table and let me ask Mr. Homan and Mr. Slonaker also to come up.

Mr. CASON. That would be terrific.

Senator CAMPBELL. We have some questions we might want to bounce off all three of you.

Paul Homan, and Mr. Slonaker, both former special trustees, come and sit down. Mr. Slonaker, you seem to have a couple of new appendages this morning. Sorry to see that, hope it's all right.

Mr. SLONAKER. It's broken but it's healing.

Senator CAMPBELL. You didn't do that in our State skiing, did you?

Mr. SLONAKER. No; nothing as dramatic as that. [Laughter.]

Senator CAMPBELL. All right, why don't we go ahead with Mr. Homan first, if you'd like to. Your complete written testimony will be included in the record, if you'd like to abbreviate.

**STATEMENT OF PAUL M. HOMAN, FORMER SPECIAL TRUSTEE
FOR AMERICAN INDIANS**

Mr. HOMAN. I will abbreviate my statement, but I would like my full statement to be included in the record. Thank you very much, Mr. Chairman.

And thank you for the opportunity to appear before the committee. It's been some time since I've been here.

On September 19, 1995, I was appointed the first Special Trustee for American Indians and served in that capacity until January 7, 1999, when I resigned rather than accept the reorganization of the Office of the Special Trustee set forth in the secretarial order 3208, dated January 5, 1999. The order was really the last of a series of departmental decisions taken over my tenure as special trustee to usurp the powers, duties and responsibilities vested in the Special Trustee by the American Indian Trust Reform Act of 1994.

For all practical purposes, the cumulative effect of these departmental actions and policies deprived, in my opinion, the special trustee the independence and the authority that was intended by the Reform Act, and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the special trustee, the advisory board and the Office of the Special Trustee.

Since the Reform Act was passed in 1994, the Department's record regarding the role of the special trustee and trust management reform demonstrates over and over again that the reform efforts of the Office of the Special Trustee were under-funded, understaffed, delayed and otherwise frustrated in favor of higher departmental priorities. The Reform Act was fundamentally flawed, in my view, in one important respect, in that it failed to provide the Special Trustee with the independence and the authority to carry out the purposes of the act. During my tenure, most of my powers were strictly oversight, which proved to be largely ineffective.

More important, over the objections of myself the Department failed to address what I consider the primary cause of the longstanding trust management problems, the mismanagement and neglect inherent in the Bureau of Indian Affairs, the resolution of which is required before any meaningful reform can be implemented. The result has been a near complete failure to date in bringing about any effective reform of the Indian trust management activities of the Department and the Bureau of Indian Affairs.

As noted, the primary cause of the longstanding Indian trust problems is lack of competent management, pure and simple. For over 20 years, knowledgeable and informed professionals have called the Bureau of Indian Affairs the worst managed agency in Government. Every outside study, indeed, most internal studies I researched as Special Trustee agreed with that conclusion. I agree with that conclusion.

Judge Lamberth, in the *Cobell* case just last week, said "The Individual Indian Money Trust has served as the gold standard for mismanagement by the Federal Government for more than a century." It is axiomatic, in my view, in private sector restructuring, in which I've had a lot of experience, that if management is the problem, management must be removed and replaced if restructur-

ing and reform is to be successful. Nevertheless, as well-known, clear and practical a remedy as this is, I also observed that in previous reform efforts over the last 25 years, no senior manager at the Bureau of Indian Affairs, to my knowledge, or department, has been removed because of incompetence. In addition, every reform effort in the last 25 years has been left largely in the hands of the very incompetent BIA managers who contributed to the problem in the first place.

While special trustee, I became convinced, and still believe that the Department did not have and does not have the will to address the mismanagement issue and force out the incompetent managers, nor was and is the Department likely to attract competent managers willing and able to undertake a timely reform effort within the Department of the Interior. Without both, no reform effort can succeed.

I therefore recommended to the Secretary of the Interior and to the Congress in the 1997 Strategic Plan that the Department should support the establishment of an independent agency outside the Department of the Interior to manage the Indian trust management activities and the reform effort. The Secretary at the time instead opted for the Department's historical approach to reform and decided that any reforms would be undertaken solely by the Department of the Interior. Again, in August 1997, I recommended to the Secretary that the reforms being considered in what later became the high level implementation plan not be left largely in the hands of the Bureau of Indian Affairs to implement. The Secretary again opted for the Department's historical approach, and decided in favor of the BIA's managing most of the reforms of the high level implementation plan.

The Department currently appears to be using the same historical approach to reform, apparently with as little success as the previous administration. Recent court filings in the IIM litigation indicate just how unsuccessful the reform efforts have been. Based on these filings, just last week, that's September 17, U.S. District Judge Royce Lamberth held Secretary of the Interior Gale Norton and a senior aide in contempt of court for deceiving him about the agency's failure to reform the trust fund activities. He found:

The agency has indisputably proven to the Court, Congress and the individual Indian beneficiaries that it is either unwilling or unable to administer competently the Trust. Worse yet, the Department has now undeniably shown that it can no longer be trusted to state accurately the status of its reform efforts. In short, there is no longer any doubt that the Secretary of Interior has been and continues to be an unfit trustee delegate for the United States.

Managerial incompetence, mismanagement and neglect in the Department's management of the Indian Trust management activities are rampant, and have resulted in conditions that are unacceptable by any reasonable standards, and continue to do significant harm and damage to American trust beneficiaries. They have also caused permanent damage to the trust management systems the Government uses to manage the Indian lands and monies. These defective systems prevent the Government from meeting the fiduciary accounting and reporting standards required by the American Indian Trust Fund Reform Act of 1994, and standards of ordinary prudence applicable to all trustees, public and private.

This serious breach of trust exposes the Government to liability and loss that it experienced in resolving some of the largest bank and thrift failures during the financial crisis of the 1980's and early 1990's. Until mismanagement issues are addressed at the Department and Bureau of Indian Affairs, no meaningful reform can take place, and the Government's exposure to loss and liability to American Indian trust beneficiaries will continue to escalate.

In sum, the record shows, and I believe, the Department does not have the will or ability to address the mismanagement issues, and force out the incompetent managers at BIA and the Department. Nor is the Department likely to attract competent managers willing and able to undertake the time and reform effort within the Department of Interior. Without both, no reform effort can succeed, and in the circumstances, alternative reform structures managed and implemented outside the Department should be considered by the United States.

Thank you very much. I'd be glad to respond to your questions. [Prepared statement of Mr. Homan appears in appendix.]
Senator CAMPBELL. Okay, Mr. Slonaker, go ahead.

**STATEMENT OF THOMAS N. SLONAKER, FORMER SPECIAL
TRUSTEE FOR AMERICAN INDIANS**

Mr. SLONAKER. Thank you, Senator Campbell.

I'm pleased to have the opportunity to share my thoughts with you and the committee on the role of the special trustee under the 1994 Indian Trust Reform Act. What I'd like to do is briefly summarize my written testimony that I've submitted for the record.

I've had the privilege to serve as the special trustee for over 2 years, since I was confirmed in May of the year 2000. Let me tell you first what I think the obstacles have been to the special trustee and the execution of the special trustee's obligations as laid out in the 1994 Act. Then I'd like to provide you with my recommendation going forward to achieve trust reform and fulfill the Government's obligations.

First, on the obstacles. There are several. I think the one that I would put at the top of the list would be that the special trustee has no line authority in this whole procedure. It has an oversight role, and has no line authority to ensure and to effect changes as they may be needed. It can only report on what the Department does or doesn't do to both the Congress as well, of course, as the Secretary and now obviously to the Court as well. So therefore, if the Department doesn't accomplish what it's supposed to do in terms of trust reform and accounting, there is no way for the special trustee himself or herself to ensure that.

Second, there is a deep reluctance, in my opinion, within the Bureau of Indian Affairs, noticeably at the middle management levels to provide for trust reform on an effective and timely basis. That's been going on for, as you know, I think, decades.

Third, there is no accountability demanded of those people within the Bureau or elsewhere within the Department of the Interior who have Indian Trust responsibilities that they are not fulfilling. There appear to be no consequences for those who do not fulfill those responsibilities.

Fourth, there is no one in charge who heads a single, separate, clean chain of command for those people charged with trust duties, so that they have just one priority, just one type of obligation and just one chain of command to report to. Additionally, there appear to be additional conflicts of interest with some BIA positions between their current trust duties, the fiduciary trust duties on the one hand, and other responsibilities.

Fifth, many tribal leaders appear to oppose adamantly any trust organization change that would separate the fiduciary trust function, that is the management of the assets, from other responsibilities within the BIA.

Sixth, the concern for the litigation posture of the Department has been the first priority, in my opinion. Only those actions in support of trust reform that support the litigation position appear to be tolerated. For my candor in reporting as a special trustee on the status of trust reform to both the Congress and the Court, as required, I was considered not to be a "member of the team."

Seventh, there has been an effort to diminish the trust standard, in my opinion, as well over the years that the Government has to both the tribes and individual Indians.

Let me tell you what my recommendation is. There is no reason that the Department cannot recognize and demand compliance with the trust duty. There appears to be no political will to ensure compliance with the Government's trust obligation. Only a single direct line chain of command, as I mentioned before, for all personnel, supporting the trust activities, has a chance of succeeding. Only the special trustee with her or his legal responsibility, trust experience and Congressional obligation is best positioned to exercise the required authority on behalf of the trustee designate, but the special trustee's position, as I said before, doesn't have that line authority.

In my opinion, the Department is incapable of executing trust reform. And indeed, even knowing what and how to do so, or to provide the experienced, competent people resources needed in most cases. More than being incapable there is often a seeming unwillingness to adhere to the trust principles of the 1994 Act in the Department's own manual, as well as to hold people accountable for their actions or consequences for poor performance.

I have come to the conclusion, therefore, that it's important to have a strong oversight role outside the Department, responsible to the Congress and headed by an experienced trust management executive, advised by a board of trust experts and Indian leaders. In a sense, this is the Office of the Special Trustee as established by the 1994 Act, but placed outside the Department. This executive oversight position and the attendant organization need to have the ability to require changes when needed changes by the Department itself are not forthcoming.

There are some instructive models available in the form of Government-sponsored enterprises that have addressed issues of public policy in other venues, such as the failures of many savings and loan institutions a few years back. Such outside authorities can provide for eventually returning the trust operations to the Department at such time as the systems, the procedures, the records and

the leadership are ready, and the Department exhibits the willingness and ability to carry on with its fiduciary trust responsibilities.

Thus, in my opinion, trust reform is not going to happen until there is an authority outside the Department that can compel compliance with the Government's trust duty and demand accountability. The most recent decision of the Washington, DC District Court, which stopped short of appointing a receiver, hopefully will enforce enactment of that trust reform. That solution, however, will only succeed, in my opinion, if the Department is actually forced to comply with needed change.

Thank you, Senator. I'll be available for questions.

[Prepared statement of Mr. Slonaker appears in appendix.]

Senator CAMPBELL. Thank you, Mr. Slonaker.

Well, let me start by telling you that, as you probably remember, in the year 2000, February 2000 when I was the chairman, I circulated to all tribes and the Inter-Tribal Monitoring Association, a draft bill that would have set up an Indian Trust Resolution Corporation, that would have been somewhat patterned after the trust corporation that resolved the S&L mess. I think there was some miscommunication somewhere, because the Department opposed it at that time. I think many of the tribes were a little bit wary of it. So we didn't try to push that bill, I didn't even introduce it.

But basically what you're saying now is, along that line, that maybe we need something along that line independent from Government, to settle it. My thought then was that, as we've heard in some of the other testimony, that in some areas, some of the people in the Bureau are not considered competent enough to resolve this problem. But independent experts in money managing should be the direction we should go. Would you like to comment on that?

Mr. SLONAKER. I basically agree with that, Senator. I would take small exception to your next to the last sentence, I think. There are some very competent people in the Bureau of Indian Affairs who want to do a good job, and who don't always get the message, but want to do the job. So I think this is a, I wouldn't suggest that this is a solution that looks to outside experts necessary in its entirety at all. I think we can involve a lot of the people who are now involved with it. But it needs to be a single organization outside the Department that can actually force the change.

Well, I appreciate that correction. I didn't mean to imply that they're all incompetent or not. Most of the people, I think, are very good and very hard working.

Let me ask Jim Cason. First of all, I want to commend Secretary Griles and you along that line for all the work you've done in our past hearings and keeping the committee informed of your negotiations with the tribes. I certainly applaud you for that, too.

Mr. Slonaker and Mr. Homan, it seems that their experience leads them to believe that a single, accountable unit on trust reform is necessary. But they go a little further, and as I mentioned, talk about some outside help, outside the Department. I would think that their combined experience over the last 9 years might have some real validity. Would you like to comment on going outside the Department?

Mr. CASON. I would like to do that, Mr. Chairman. I guess I would start off that, I don't think there's a panacea that any one

single thing is going to fix this trust problem. It's not one single person who's a special trustee, it's not one single organizational unit. It's not one single budget initiative. It's a very complicated problem. And it's going to lend to complicated solutions and a lot of work on a lot of people's parts.

In this particular area, of having one single accountable executive, we basically agreed with that. That's been a subject matter of our efforts to work with the beneficiaries to identify a single accountable executive and that together with Indian tribes and the Tribal Task Force, we basically identified the need for an Under Secretary position in the Department of the Interior who would have line authority within the Department of the Interior to manage all Indian related activities within the Department, so that we could accomplish what's been suggested this morning.

Senator CAMPBELL. So you would suggest that position would take over or absorb the Trustee's duties?

Mr. CASON. Yes; that has been the position of the Task Force, that that person should have these job duties. And we patterned the job duties very closely after those that have been assigned to the Special Trustee.

But the other element of your question was also addressed by the Task Force, and that's the element of taking the responsibilities outside the Department of the Interior. What we did with the Tribal Task Force is, we started with a blank sheet of paper, and said, let's assume there are no restrictions to what we would do, what are the best options for us to pursue. And during the course of the activities with the Task Force, we identified 29 different options that individual Indians or tribes wanted to have considered. And several of those options included taking the responsibility outside of the Department of the Interior.

In one case, one of the options was to form a Department of Indian Affairs, so you would remove all the responsibilities out of the Department of the Interior as well as some of the functions from other departments and consolidate them into an independent Government department. There was also an alternative that would remove the fiduciary trust responsibilities from the BIA and OST and put them into an independent organization much like the one you were talking about. Let's take all those fiduciary responsibilities outside the Department and have them managed elsewhere and resolve the conflicts that are there, outside the Department of the Interior and all the institutional barriers that we have.

Both of those options were evaluated by the Task Force and the beneficiaries, in this case, the tribal leaders on the Task Force, rejected those options and said, you know, they have some attractive elements to them, but we don't think that's the right way to go. And they instead went in the direction of favoring the Under Secretary route and keeping the responsibilities within the Department.

Senator CAMPBELL. When we floated that idea before, I think some of them felt that it would be a step back from trust responsibility if we let the Department off the hook.

Mr. CASON. I think there's a variety of reasons why they rejected it. But we did have it on the table. And it was a potential option. But the Task Force basically didn't warm up to doing that.

Senator CAMPBELL. How many total meetings have you had so far, as the Task Force?

Mr. CASON. As Task Force meetings, I think we're on the order of seven or eight. We've basically had them monthly since I think late December was the first one we had.

Senator CAMPBELL. And you just had another one just recently?

Mr. CASON. We will have another one on Thursday.

Senator CAMPBELL. At our last hearing on this subject, or maybe it was the one before, I floated the idea of what happens in many class action lawsuits, that people can, there's usually a way they can opt out and settle individually. Was that taken up, or did you mention that in your last meeting with the Task Force?

Mr. CASON. It hasn't been, as best I recall, a subject for the Task Force of having a settlement or opting out provisions from the *Cobell* lawsuit. It is an item, an option that we're considering how we would be able to speed up the process and offer alternatives to a long term historical accounting approach. As you recall, Mr. Chairman, we talked about that the last time I came to testify, that the historical accounting program is usually expensive, it's projected to cost \$2.5 billion and take 10 years or more to complete. You had suggested that we look for alternatives where we could speed that up through some sort of a settlement process or some sort of an offer to the individuals to have another alternative, other than the historical accounting process. So we are looking at that.

Senator CAMPBELL. Mr. Homan, Mr. Slonaker, what would you think of that approach?

Mr. HOMAN. Well, first of all, I don't believe that the systems and the condition of the records relative to an accounting exist in the Department of the Interior. So I don't believe that spending a nickel or \$2 billion is going to enable the Department to account to the American Indian trust beneficiaries. The *Cobell* case involves individuals, as you know. The Department has stipulated to the courts that there are no records, electronic records, before 1985. So how possibly could anyone account to those beneficiaries?

My own view, at least until I left, because I was looking at the IIM records almost every week, is that it's worse than that. The records that exist since 1985 are woefully deficient. Sometimes leases cannot be traced to general ledger entries. The Department has never had what they call a universe of leases, so they don't know how many there are. The Office of Trust Fund Management handles one aspect of that, I think well, and I think that is one of the things that was reformed correctly. It accounts for the deposits, and it disburses them, but it doesn't know whether the nickels it receives should be dimes, because the Bureau of Indian Affairs can't tell them. It doesn't know when it disburses it to an individual Indian beneficiary, whether that's the proper beneficiary that owns that particular asset. Again, the Bureau of Indian Affairs cannot keep its records up to speed.

So I don't believe an historical accounting can be done correctly. I think that the Department ought to admit that. I said that to the Department of Justice in 1997. I said to the courts that. The Department should admit that it can't do an accounting. It has to settle with these beneficiaries. It's going to be rough justice, and I think that if the Congress or the Administration doesn't come up

with a way to deal with it, the courts will impose a settlement that maybe no one likes.

Second, I take umbrage with the Department's ability to reform itself from within for one reason. And that is that it is poorly managed. I'm not suggesting that every single unit in the Bureau of Indian Affairs is mismanaged, but even the competent managers there are not trained in trust. They don't have a trust culture. I have never met a single person, save one, that would qualify as a trust officer in a national bank, which I regulated for a number of years. So they would require massive retraining. And I don't think they have the experience. They have the experience dealing with obsolete systems that go back 30 and 40 years in some respects. I don't believe they can be brought up to speed in time to make effective anything like a commercially acceptable trust reform effort.

That is the singular reason why I suggested to the Secretary, to the Congress, that not only do you move the trust management activities outside the Department of the Interior, in a GSE or some other agency, but that you also change out management, like the RTC. And I applaud you for your efforts in the year 2000.

The RTC outsourced, outsourced under an oversight board to competent business managers, trustees, if you will, to solve the 2,900 resolutions of the banks that were failing at the time RTC went out of business in 5 years. And I think that is what's required here. They didn't use the management of the previous FSLIC, which was the insurance corporation, or the Home Loan Bank Board, which was the supervisor. In a sense, those employees got bypassed and fired because they didn't do their job. That appears to be one of the only ways to deal with Government employees who, in their performance evaluation reports, are all rated fully successful or better. How can you remove anybody with that type of a performance rating under the Government rules? And the answer is, you can't.

This is the same issue that was discussed just this week. The Administration in its homeland security bill discussed said that only 434 employees had been removed for incompetence last year, out of how many thousands. So it's very difficult to deal with mismanagement in Government. It's an 18-month to 5-year process when you undertake this, and no senior manager wants to do that. And the Department, I think their record is clear, none of them have had the courage, the willingness, and maybe they're just frankly unable to do it.

Therefore, I have no confidence that any type of structure, and the one being proposed by the Department these days is no different than the one proposed in 1993 by Secretary Babbitt, and which the Congress overrode in favor of the Special Trustees Reform Act. And it, as I said, is not successful.

But I think that some alternative would be successful. These are basic accounting and bookkeeping issues that every single national bank and trust company in the United States has solved. There hasn't been a trust failure since the 1930's in the national banking system, not one. Managing Indian lands, Indian assets, are no different than what small commercial banks, small commercial trust companies manage every day competently for the benefit of their beneficiaries.

So I think the Government has to face this issue.

Senator CAMPBELL. There might be one difference. I have a hunch the banking system does a much better job in record keeping than the Federal Government. I guess that's one of my basic concerns. When we talk about historical accounting, that leads to the assumption that there's something to account or there are some documents out there or something. But with this huge number of totally missing, gaping holes in the ability to document, that's why I thought, well, somewhere along the line we've got to cut our losses and start cutting some checks to people that want to opt out. Because I don't think we're ever going to be able to get a complete and full accounting when we hear stories like we did a couple of years ago of rat infested garbage bags full of partially eaten documents in warehouses in Albuquerque, things of that nature.

Jim, did you want to comment?

Mr. CASON. Yes; I just wanted to make a couple comments, Mr. Chairman, if I can.

On the issue that you were just talking about, the historical accounting, clearly there are problems and obstacles and difficulties that we'll have at the Department of the Interior to do an historical accounting. There are missing documents. There are faults with computer systems. We've had generations of people accounting for monies that were paid in and they had different systems to use. Those systems have changed over time. There's been transitions of data. There's all kinds of reasons to point at some of the failings of the past as to why we would have difficulties.

But on the other hand, we do have 15 years worth of data in automated systems that has millions of transactions that are available, and we have somewhere on the order of 500 million pages of admittedly poorly organized records.

Senator CAMPBELL. 500 million?

Mr. CASON. That's the estimate I've seen. There's lots of paper around to help with the process.

Will it be easy? No. Will it be absolutely complete on every case? No. But there is a lot that we can do in a "best efforts" type of approach to provide an accounting to the beneficiaries.

Does that mean that we shouldn't look at a way to speed the process up? No. We would like to do that. We would like to see if there is an option where we can basically provide some sort of compensation to individual Indians in lieu of an accounting so that we don't have to broach that if we can find a good way to accommodate it.

But just as an illustration, Mr. Chairman, as to where we are with this, we went through an exercise in the Department at the behest of the Court to do a virtual accounting for the five named plaintiffs in the *Cobell* lawsuit. If I remember correctly what the number was, we had somewhere on the order of 190,000 documents that we prepared or were provided to do the accounting for just these five people, one of whom didn't have an account. So basically 190,000 documents for four accounts.

So there is a lot of documentation there. But it won't be complete. And the best we can do is basically a best efforts type of an accounting in which some accounts we will be able to do pretty well, and some accounts probably will be poor.

Senator CAMPBELL. As I understand it, Judge Lamberth has set trial date for 2003, for the next phase of the accounting methods.

Mr. CASON. That's right.

Senator CAMPBELL. How far are you going to be along that line in order to present your case before the Court?

Mr. CASON. It's our hope, Mr. Chairman, that we will complete the accounting for the five named plaintiffs and that we will have several thousand judgment accounts done, and that we will have some individual accounts, land based accounts, done so there will be a set of options to look at in the phase two trial in May. And the Judge has also asked us to provide the accounting plan, whatever we plan to operate in January. That will be the basis of the trial in May.

And I would agree with Mr. Homan, it's a tough job. There is a lot to do, and there are a lot of holes in the process. But the issue is, do we stop right now and throw up our hands and say, we can't do anything, and that the only option is to pursue some kind of settlement, or do we pursue a course of action to do what we can, to do the best job that we can, and get as many facts as we can on the table and then reconcile from that point.

Senator CAMPBELL. With that new trial date set, and the contempt citation, has that been somewhat demoralizing, or are you still able to kind of keep your focus on this problem?

Mr. CASON. Mr. Chairman, it is demoralizing. One of the things that we noticed in looking at the Judge's opinion is the timeframe for the contempt citation was principally for activities that occurred prior to our Administration. But they were associated with the current Secretary in her official capacity as Secretary. So many of the things that were the source of the contempt findings were unrelated to the activities of this Administration.

It was disheartening to find that the Secretary was found in contempt in that particular way. We understand it, and we accept and recognize the job that we have to do on trust reform. The Secretary, I can tell you, is no less committed today than she was last week to trust reform and doing the things that are necessary. I've been in her presence where she's made that abundantly clear, that we still have a job to do. We need to focus on that job, and we need to get on with it.

That doesn't mean that what Mr. Homan says is not true. There are challenges for the Department. Getting the right kind of management in the right places is a challenge. Fixing the systems in the Department is a challenge. There are a number of things that we're working on in a pretty broad agenda to try and amend the current environment.

Senator CAMPBELL. In amending that current environment and that agenda, are you also considering outsourcing for some of the documentation?

Mr. CASON. Well, as far as documentation, I don't know specifically about that. But as we look at the activities that we're required to do to administer the trust, outsourcing and the use of private contractors is an element that we consider in each of those. And to the extent that we can find functions that we can outsource, we'd be happy to do that.

Senator CAMPBELL. Have you done it yet?

Mr. CASON. So far, where we've been is an assessment of the systems. We had an outside contractor, EDS, who did an initial status review of where we were with trust reform. And I think that's an effort that Tom arranged for, is to bring an outside contractor in to do an independent assessment of where we were as a Department on trust reform. They delivered that, and we're also using EDS to go to the next step, which is to evaluate our as-is business processes. Because one of the things that led to the concerns about our TAAMS program was that we started with a commercial, off the shelf software system that didn't recognize the panoply of different ways of doing things among the 12 regions of BIA.

So we're going back to the drawing board to sort out how each of the regions do their business, identify a standard against which we can operate, and then try to automate the standard, instead of trying to modify software to do things 12 different ways. So we're using contractors for that. We're looking at contractors for appraisal work, to augment the BIA team, we're looking at contractors to help with survey. Because right now there's too big a burden and a bottleneck with cadastral survey in BLM. There's a number of other areas where we'll look at contractors to help. Records is one of them. We don't have the necessary staff within the Department to deal with records. So we're looking at contractors there.

One other point, if I may, Mr. Chairman. I'd like to respond to Mr. Homan. We looked at this issue of taking the responsibilities outside the Department. And certainly, the Department would be pleased to work with you and other members of Congress to critically examine that issue again. There hasn't been any effort on the part of this Administration to try and protect the job duties at the Department of Interior. It's been rather to recognize those are our duties for the time being, and we're going to do the best we can with them. But we'd be happy to work with Congress to look at other solutions, if that appears to be the course of action that's needed.

However, I would suggest that in our efforts with the Task Force, we put that option on the table. And one of the considerations that both Congress and the Department has been sensitive to is, what do the beneficiaries want? What do the tribes want out of this process? Do you want it to be outside the Department? Because if they don't want it, then both Congress and the Administration have the option of imposing that solution upon the beneficiaries. And that may be necessary. It may not be necessary, but it's a consideration that we have to build in, that they have a say in this, too. We're managing for them.

So this is a participatory trust. They are participants in the process, and somehow we have to get past that issue of what do you want in this process as well.

Senator CAMPBELL. The National Congress of American Indians meets in November. Do you have any further plans to meet with the commission before then?

Mr. CASON. To the best of my knowledge, we're meeting this Thursday. We have a scheduled meeting in October in Billings, MT. That's an issue that we'll address on Thursday, as to whether

we should have that meeting and what the agenda will be. Those two are planned before November.

Senator CAMPBELL. As I've mentioned several times before, they convene in November. I'd like to have some kind of a draft that they can look at, not a bill, but something for them. So I would appreciate any input.

Can you all stay for a few minutes? That was our call to vote, and I understand Senator McCain is due to attend right after the vote. So if you can hang around for a few minutes, I'd appreciate it.

We'll stand in recess for 10 minutes.

[Recess.]

Senator CAMPBELL. The committee will reconvene. I did see Senator McCain over on the Floor, he is on his way over now. As he had originally asked for this hearing, I think we need to wait for him.

Let me ask just a couple of others, though. Mr. Slonaker, in your testimony you mentioned several times about transparency being needed. What is it now that you think is not transparent about the process?

Mr. SLONAKER. I don't think, at least when I left the Department at the end of July, I still don't think there was quite the transparency about a lot of what I'm going to continue to call the sub-projects for trust reform that there should have been. As they have been reported in the court reports, I think there is a long ways to go there. The largest problem is finding the capable project managers, Senator, so that they can plan their activities, understand what it requires, and then to get it done, and also to report it accurately. I think, as Mr. Cason has already mentioned, we had brought EDS in and I think that effort is basically the only effort that's going on in trust reform right now, but it's an important one. Because they are doing the as-is study of trust systems. From there they will have make the leap to what it should be, what the system should be. That's going to be a major step to come.

Senator CAMPBELL. The concept that the Secretary came up with about 10 months ago and kind of ran into a brick wall, the BITAM concept, how do you view that? Do you think that's a step in the right direction?

Mr. SLONAKER. Yes; I endorsed that. Because what I liked about BITAM is that it took those people who were responsible for trust and put them in, a fiduciary trust, managed for the assets, and put them into a single organization so they could focus on their trust duties and have no competing priorities. So I like the single chain of command idea.

The problem I have, and frankly, I feel differently about it now than I did 10 months ago, is that I think there is still lacking the will to really get the job done. So that's why I, as you heard me earlier, recommend that it's going to take an outside agency to do it.

Senator CAMPBELL. And that outside agency, let me ask you and Mr. Homan too, as you probably know, one of the disagreements, one of the things that's holding up some progress is that the tribes want an outside and independent group that basically, as I understand it, would have the authority to overrule the Secretary if they

disagree with the decisions. The Administration has said very simply that's never been done in the history of the United States, that any outside commission has overruled a Federal agency, and they simply will not go with that idea.

How do you view that, or do you have any idea about where we can find some kind of compromise with an outside quasi-independent commission but would still satisfy the Administration's belief that they should not have veto authority? I'd like to hear from both of you.

Mr. SLONAKER. Let me just make two comments about that. First of all, I'm uneasy with the notion of a commission. A commission suggests a committee, and I don't know of anything that's been run well by a committee.

Senator CAMPBELL. We'll testify to that.

Mr. SLONAKER. So I think it needs to be a single executive director. Whether you call it a special trustee or whatever it is, it needs to be a single executive director who has a board, much as the Special Trustee has had under the 1994 Act, of trust experts as advisors to him or her and also prominent Indians, tribal leaders and people who, and representatives of individual Indians who understand what trust is from the Indian standpoint. So I'm leery to begin with, Senator, of the notion of a commission.

Senator CAMPBELL. So what you basically are saying is that advisors or whatever the word would be, they would work within the existing framework rather than be totally independent?

Mr. SLONAKER. I think the special trustee or the executive director, whatever you call it, needs to be outside the organization. I think that advisory board needs to be outside the Interior organization as well.

The second part of it, though, is that I think you need to be able, the outside agency needs to be able to compel the trust reform and accounting to be done. I'm particularly concerned about trust reform. There is no reason that the 1994 Act didn't work or isn't working. But it relied, unfortunately with 20-20 hindsight, too heavily on the will of the Department to get the job done. And that's the part that didn't work.

Senator CAMPBELL. Well, I've heard a number of times it's been underfunded. But as I understand it, since 1994, roughly 8 years, we've put in between \$600 million and \$700 million into this effort. And it's roughly \$85 million this year.

Mr. SLONAKER. Senator, funding is not the problem. It's the resources of the management people as well as the will to do it.

Senator CAMPBELL. Thank you. Mr. Homan, would you comment on this?

Mr. HOMAN. I agree. It goes back to management. That is, or mismanagement, I should say. That is why, I think to back up to your question, I don't believe the secretary of the Interior should have a veto power, if it's moved to a third party GSE. No other GSE operates under such a regime.

Senator CAMPBELL. The way I understand it, the tribes would like the veto over the Interior Department.

Mr. HOMAN. I understand that, too. But I don't believe that any other GSE operates under that type of regime. And to the first question, if you move this operation to a GSE, an RTC type of cor-

poration, it should have the full power of the delegated powers of the United States as trustee. Remember, the Secretary of the Interior is only a delegate trustee. In law, the real trustee is the United States Government. Therefore, you can switch from Department to Department. The Department of the Interior didn't have this authority until 1849. Before that, the Bureau of Indian Affairs existed as an independent agency, reporting directly to the Congress, like the bank regulatory agencies and particularly the Federal Reserve and the FDIC. They are appointed, their managements and boards are appointed by the President. But they operate independently and they report essentially to the Congress through oversight.

But they don't have any other administrative executive branch, agency, with veto power. Nor should the beneficiaries in this case have any sort of veto power over the actions of the trustee. So my idea would be to move the trust activities, and that's not all of the activities of the Bureau of Indian Affairs, it's a very small part, probably less than 1,000 people. Those trust activities are asset management, funds management and the land title and records. I'd move that into a separate agency reporting to the Congress.

Senator CAMPBELL. There have been a few successes and a number of failures in reaching a compromise. But I appreciate your comments, because it reinforces my belief that we need more help from independent entities, as outlined in your testimony.

Before I ask for Senator McCain's questions, if Mr. Cason would like to make one more comment.

Mr. CASON. I would like to make a brief comment. Mr. Homan raises the issue about beneficiaries having a veto. That certainly is something that we ought to talk about. In the course of making our proposal for BITAM, Tom is a special trustee and this Secretary, we're in agreement on the BITAM proposal. This is the right thing to do, to separate the fiduciary trust responsibilities out into a separate organization so they can be managed separately. And we submitted a reprogramming to Congress to ask for the ability to do that and basically, the Indian tribes reacted adversely and there was concern on Capitol Hill about us moving forward without the beneficiaries being part of the solution.

So whether there is a stated veto or not, there is at least an implicit one that we need to try to work together with the beneficiaries on solutions that they also agree to before we move forward to deal with trust reform in this kind of a meaningful way.

Second, just as a comment on the commission, the Department was willing to work with the tribal task force on several options for some kind of outside advisory body. And the sticking point that we ran into was the issue of lining up authority and responsibility and liability. And that what was being proposed by the Task Force members was a commission that would direct the Secretary to do certain things and had the ability to sanction the Secretary if the Secretary did not do those things, but had no responsibility for the results, had no responsibility for ensuring that resources were available to do those things.

So we well could have been in a position that the Commission directs the Secretary to do something for which there were no budget resources, and if Congress chose not to provide those re-

sources, then the Secretary would be sanctioned for failure to do things. And that was a problem.

We had suggested in the alternative an advisory committee to the Secretary, an advisory committee to Congress, so Congress could review the results and direct the Department to do certain things through the normal authorizing appropriations process. But we didn't find a meeting of the minds at that point.

Senator CAMPBELL. I appreciate that. Thank you.

Well, I've concluded the questions I want to ask. Senator Inouye may have some. He's not with us today, but he may submit some to you in writing, if you would answer those.

I'd like to invite my colleague, Senator McCain, who asked for this hearing, if he would like to ask some questions.

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Cason, did you say that you were worried that if a settlement was reached, or an agreement was reached between the tribes and the Department of the Interior that Congress wouldn't fund it?

Mr. CASON. What I just stated is, if the independent commission that was under consideration directed the Secretary to do things for which the Secretary did not have budget resources and the Congress decided not to fund it—

Senator MCCAIN. If the Secretary accepted it, which secretaries have accepted recommendations of hundreds of commissions over the years that I've been here, what would make you think that, now, if the Secretary didn't accept it, that's one thing. But if the Secretary accepted it, what makes you think that Congress wouldn't fund it? I mean, if Congress didn't fund it, it would be a clear betrayal of our responsibilities. I don't follow your logic.

Mr. CASON. Okay, Senator, perhaps you have a different perspective you'd like to explain to me.

Senator MCCAIN. I have the perspective of serving 20 years in the Congress. When a commission suggests something, and the stamp of approval by the Federal Government is on it, of course Congress funds it.

Mr. CASON. It's just been my observation, and perhaps in error, that the budgetary process is one of competing priorities and competing resource requirements. Sometimes not everything gets funded.

Senator MCCAIN. Well, here we are, welcome back, Mr. Homan, welcome back, Mr. Slonaker. Here we are. Years and years, you know, in the words of Yogi Berra, *deja vu* all over again. Still no progress, still Native Americans that have no accounting or any compensation or what they deserve that they've placed in the trust of the Federal Government. Two Secretaries of the Interior held in contempt by a Federal judge. I've never heard of such a thing before. I don't know if Senator Campbell has or not.

And Mr. Slonaker states that he resigned from his appointed position under pressure, following in the footsteps of the first special trustee, Mr. Homan, who resigned in protest of Secretarial actions, which Mr. Homan believed usurped his authority. So we've had two special trustees, both of them were not allowed to, at least in their view, carry out their responsibilities. And here we are again, with still Native Americans being treated in a cavalier fashion which is

pretty remarkable. I don't know any other group of Americans that would be treated in this fashion, to be honest with you.

Let me throw something up, particularly to Mr. Homan and Mr. Slonaker. And I'd be glad to hear your comments, too. There is a certain precedent for this kind of problem in treatment of Native Americans, and that's the issue of water in the west. We all know that by certain treaty, we guaranteed Native Americans, specifically talking of my home State of Arizona, certain water rights. Those rights were ignored for however long the life of the treaty.

In recent years, we've entered into negotiations with Native Americans to settle those water rights, and we've had a number of agreements in Arizona. We now have a very large one pending. Recognizing that we can never give Native Americans back the water that they didn't get, it's a perishable commodity, most people believe that there's no way we're ever going to have a full and complete accounting of the trust funds. Most people believe that the point now is to try to settle this so that this practice just doesn't go on ad infinitum and ad nauseam.

So trying to think a little bit outside the box, I'd be interested in all three witnesses' opinion, beginning with you, Mr. Slonaker.

Mr. SLONAKER. Let me say that there are a couple of issues here. One is that there is the accounting, or what is often referred to as the historical accounting, and that's really what you're alluding to specifically. I would agree with you that at some point, in my own personal opinion, it's probably going to have to be negotiated, because there isn't any other way. But in the meantime, it seems to me the law says that the Government should find out every piece of information they possibly can.

Senator MCCAIN. And we haven't done that.

Mr. SLONAKER. No; not to any meaningful extent.

The other point, though, is that—

Senator MCCAIN. Could you venture an opinion as to why we haven't?

Mr. SLONAKER. I don't think there's been a will to do it, to tell you the truth. I don't think there's been a real interest in really exerting the effort and acknowledging the trust law that exists that requires it, quite frankly.

Senator MCCAIN. I hope the witnesses don't mind if we have a little dialog here. Does that mean taking it out of the Interior Department?

Mr. SLONAKER. Yes; I think it does. I think at least taking it out in the sense that it's being directed or required, forced, from the outside, yes.

Senator MCCAIN. If you were dictator, what law would you write tomorrow to resolve this issue?

Mr. SLONAKER. I would revise the 1994 Act and put the, call it the special trustee or call it something, put somebody on the outside in an outside agency. We've talked about a Government-sponsored enterprise earlier that would have the capability, until the accounting is done, and until the trust practices, procedures, records and all that, the systems are reformed and reconstructed, until that time, to actually conduct, direct the trust from the outside. The only reason I suggest that is that, as I said a bit ago, the 1994 Act could have been successful. But with 20-20 hindsight, it

wasn't, because there's not the will to get it done. But I think there has to be something on the outside.

Senator CAMPBELL. If I might tell my friend from Arizona that we did float a draft to do something along this line in the year 2000. Unfortunately, it met with some resistance from both the agencies and the tribes, too. It might have been partly our fault, because we didn't make it perfectly clear that it wouldn't erode trust responsibility and it wouldn't do some of the things that they worried about. But it's still a possibility, if we can get the support to do it.

Senator MCCAIN. Mr. Homan.

Mr. HOMAN. Yes; first of all, with respect to moving the trustee functions outside the Department of the Interior, I have long recommended that. I don't think that the Department is willing, and I don't think it's able, given its management structure, to conduct the necessary reform effort.

Senator MCCAIN. Maybe the Treasury Department?

Mr. HOMAN. I'd move it into an RTC type environment, such as Senator Campbell suggested. Make it an independent board. But more important, like the RTC, I believe you can outsource the asset management to a large U.S. trust company, outsource the funds management function and outsource the records management function, which are the three trust activities that seem to be causing the most difficulty.

I think that in regard to settlement, I would agree with you. I think what's holding up that settlement, and I'm reading between the lines here, or one of the things that's holding it up, is that the Department still is unable to account today for yesterday's transaction, much less an historical accounting. I don't believe it's able to do an historical accounting, for the simple fact that most of the records, particularly with respect to the electronic records for the IIM accounts do not exist before 1985. And in trust law, you almost have to go back to the original treaty or original date, in this case 1888, as to when that trust was opened. And in common law, trust practice imposed by the same Government, you have to keep accounts and records open so long as the trust is open. And these accounts have been open since 1888 or whenever the particular governing instrument, the treaty originated.

So the Government is going to have to come to the table and settle at some point. One of the things that's holding that settlement up though is that there continues to be exposure to liability. If you don't have a good accounting system, a good record keeping system, and Judge Lamberth's ruling last week indicated that they still do not have that, then the transactions of today and tomorrow, are going to be subject to exposure. So how can a beneficiary say, all right, I'm willing to settle for, you name your amount, but I don't want to give up the right to sue the Government for further breach of trust, or a further accounting, since they're unable to do it? And every beneficiary has the right to sue the Government for a breach of trust, and for an accounting of the assets in the trust.

Senator MCCAIN. So you're the dictator now. What is the legislation, what actions need to be taken?

Mr. HOMAN. I would model it after the RTC, which was used to resolve 2,900 bank and thrifts failures in the early 1990's. My big

issue with the former Secretary was strictly management. You can't institutionalize reform when half or better by any study of your managers are so-called incompetent to the task and can't be retrained because of the obsolescence in their management systems. And so, it's very difficult to deal with that. The way they dealt with the same issues, with the so-called bankrupt FSLIC, which was the insurance corporation, and the Federal Home Loan Bank Board bankruptcy was that they eliminated those agencies and the employees, made them reapply for their jobs. Most of them got re-hired by the RTC. But it gave the Government an opportunity to start afresh with new management, and then outsource to the private sector a good many of the activities.

Senator MCCAIN. How much money are we talking about, in your estimate?

Mr. HOMAN. Less than the exposure to the Government that mounts every day.

Senator MCCAIN. Do you agree, Mr. Slonaker?

Mr. SLONAKER. I do, Senator.

Senator MCCAIN. Mr. Cason, you just heard a proposal, outlines for a proposal from two former special trustees. Do you have any comments?

Mr. CASON. Actually, I do, thank you. Regarding settlement, certainly doing a comprehensive accounting is a difficult challenge for the Department. We've been at this process for decades, well over 100 years. We've had a variety of systems, we've had tons of paper, made and lost, we've had various computer systems. There are difficulties in doing it, there's no question about that. The process will not be perfect, and at best what we'll end up doing for the \$2.5 billion for our accounting plan that we submitted in July is a best efforts accounting. We can't fix the things that are missing, and we can't fix some of the systemic problems, so we'll do the best that we can. And there will be people at the end who will not be satisfied with that.

With regard to settlement, we are interested in that kind of an option, if we can do something that's reasonable. In terms of defining reason, it's my understanding that the plaintiffs have been quoted in the press as they think that they're owed as much as \$137 billion as a result of this problem. And that looks like a pretty hefty price tag. Certainly it would be open to negotiation and perhaps a lower figure. But there's a lot of money potentially at stake, or perceptively at stake.

Our sense at this point is that while the accounting process may not be perfect, that it affords us an opportunity to learn much more about the specifics that are there and perhaps narrow the differences down so the negotiation might be a meaningful process in a fiscal ball park that could be mutually acceptable to all parties.

With regard to your dictator question, the Department basically started off in much the same environment that these gentlemen did, which is, we needed to isolate the fiduciary trust responsibilities of the Department into a separate organization. That was our BITAM proposal. Where it differs from what's been suggested by the former Special Trustees is that the BITAM organization would be inside the Department, but would be separate and focused exclusively on managing our fiduciary trust responsibilities. But it

would not have been a large step to move from that type of option to an outside of the Department RTC type organization.

We agreed up front with our BITAM proposal that those duties needed to be separated into a separate organization. However, when we started that process, that proposal was uniformly objected to by Indian Country. They came here to Capitol Hill and made that point. We met with them in consultation meetings and got a uniform response to that effect. Since then we've been involved in a task force with 24 tribal leaders from across the country who have uniformly rejected that kind of an approach.

Senator McCain, we put on the table with them a set of other options that were generated by Indian country, 29 other options, some of which were an RTC type organization, one of which was a Department of Indian Affairs type organization. And the tribal task force leaders rejected those approaches in favor of keeping the job within the Department.

There's probably a variety of reasons for doing that, but that has been on the table, and before you were able to join us, I committed to Senator Campbell that the Administration would be happy to work with Congress to look at that kind of an option to take it outside the Department if that's the will of Congress.

Senator MCCAIN. Thank you, Mr. Cason. My concern is that at least on this side of the room there is a lack of credibility about the Department of the Interior being able to carry out these responsibilities. I certainly don't mean that as a personal comment, but I think the record is pretty clear, as I said earlier, two Secretaries being held in contempt is an unprecedented activity. These two individuals left lucrative and pleasant surroundings in order to serve the country, both were pressured out of their jobs. And I participated in the confirmation hearing of both of these individuals, they're fine and upstanding and experienced Americans.

So we have a very large credibility gap here. Now, if as you say, and maybe I should know this, but if as you say the Native Americans seem unwilling to try new ideas or a new way out of this besides just going to court, then they'll have my sympathy but not my support. Because we've got to do something different. If we don't do something different, in Senator Campbell's and my declining years, we will be back here year after year, perhaps with a third special trustee who has resigned under pressure.

So we've got to do something different. It's time we all sat down at the table with the benefit of the experience of the two former special trustees, and in all due respect to your responsibilities, Mr. Cason, you have a lot of responsibilities. These two men solely focused on this single issue. And to lose their knowledge, expertise and experience I think would be a terrible waste, because of the time and effort that they put into it.

Mr. Chairman, I suggest that we sit down with the tribes and sit down with everybody else and if as Mr. Cason says, the tribes are unwilling to do this, then it will be like the water issues. Water issues have been in court for 50, 75, 100 years, and the lawyers do very well by that. It's wonderful, these water issues are wonderful for lawyers. There's generations of lawyers that have done well financially. And if that's who the tribes want to listen to, and stay in court and stay in this, or do they want to start thinking outside

the box. That's their choice. As Senator Campbell has mentioned, if they want to block it, they can block it. But I would start listening to their people instead of their lawyers. That's my advice to the Native Americans. Start listening to the people that are not getting the benefit here, whereas the lawyers are doing very, very well by doing good.

I would just like to have any additional comments, starting with you, Mr. Slonaker. And before I do, I'd like to thank both for you for your service, for your efforts to try and help people that very, very badly need help. I've often said that if any other group of Americans had been mistreated financially in this way, it would be a national scandal. But it doesn't seem to be with Native Americans, which will be a source of puzzlement to me for a very long period of time. Mr. Slonaker.

Mr. SLONAKER. Thank you, Senator. I'd just make one comment at the end here. We tend to talk a lot about what the tribal leaders seem to want, and the tribal task force, which was made up of tribal leaders. I think we need to keep in front of us the fact that a significant amount, although by no means the majority of the assets that are in question here, these trust assets actually have individual Indians as the beneficiary. I see frankly, as a general statement, the individual Indians being under-represented in this whole process. And I think that's tragic. It's very tragic.

And so I would add that last comment.

Senator MCCAIN. Thank you. Mr. Homan.

Mr. HOMAN. That was one of the points I was going to make, that there is a large, one of the first advice I got when I became Special Trustee is that there is a large difference between individual Indians' lands, in this case about 11 million acres, and the tribal lands. By and large, I think Tom would agree with me, most of the accounting, record keeping and other difficulties that we've discussed today come from the management of those 11 million acres which are scattered all over the United States. No one represents these individuals, and particularly the tribes do not represent them.

The tribes have their own chief financial officers for the most part. Only 50 tribes, if I remember my statistics correctly, have more than \$1 million at stake in their Government trust accounts. Therefore, the other 500 odd tribes do not have the same interest in trust reform as the tribes that have significant trust accounts. And none of them have really anything to do with the management of the individual IIM accounts, which is a whole separate operation, managed roughly by the same people. But the privacy rules, etc., are different.

I beg to differ with the Department when it says Indian Country is against this. I just can't believe that. Certain tribes are against it. But I know, as Tom said, I don't think anyone has asked the IIM beneficiaries here who have large amounts of money at stake. The only people that are representing them today in the Federal Government seems to be Judge Lamberth, unfortunately.

Senator MCCAIN. Thank you. Mr. Cason, I'd be glad to hear any response that you might have. I hope you understand that the criticisms and frustration that we express here are not directed at you as an individual. I am sure you are a fine public servant, and we

appreciate your service. But I hope you also understand our frustration as this Committee has a special responsibility to Native Americans, as you do. Please go ahead.

Mr. CASON. Thank you, Senator, for your comment. I don't take any of the criticism or the questions or the intent of the questions personally. We understand that this has been a long time problem and that it needs to be worked on. It is not an acceptable way of doing business and it hasn't been for a long, long time.

Where we are in the Department is we recognized that we have responsibilities and that we've taken on a number of initiatives to improve things. But there's a long way to go to get there, because a lot of the fundamental things that need to be there in terms of management, in terms of systems, in terms of funds and in terms of programs aren't there, or they need to be rebuilt in order to manage, like a trust. One of the issues is, for a long time, this program has been managed as another Government program, it's just another Government program and we go through the motions, try to do a good job with the resources that are available and the programs and the institutions the way they are.

Now our expectation seems to me to be evolving into, this is actually a trust like a private sector trust and that we need to manage it much more like a trust. And that has a whole different set of expectations that we're trying to meet, which requires a lot more effort or a different paradigm.

So your suggestion that we need to do things differently, we agree. And we would be happy to work with you and the rest of the members of Congress to try and work our way through what is that new way of doing business because the paradigm we operate under right now has a lot of difficulties with it. We need to look at other things. A couple of examples I think would be important is fractionation. We have an issue where original allotments that were granted to Indians back in the late 1800's or 1900's have successfully been subdivided into undivided interests, some as many as 900 different owners of one allotment.

That brings a huge administrative burden that a private trust wouldn't put up with. In a private sector trust, you wouldn't be trying to account for 900 different owners in one parcel of property. It's expensive, it's counter-productive, you have to keep track of the title interest of all, the ownership interest of all. If there's a lease on it, say you have a \$200-grazing lease, you have to divide it into 900 different interests and keep accounts for all those. There's a lot of things that don't make sense about the trust that we need to take a look at.

So there are fundamental systems to meet our trust responsibilities, and there are some things of how the trust has evolved over time that need to be adjusted if we're going to do a good job in the future. So we'd be happy to work with you and the other members of Congress to do that.

Senator MCCAIN. I appreciate your comments. I appreciate your willingness. But facts are facts. Someone who had your job before you sat in your chair and said exactly the same thing a number of years ago. I introduced a bill that would require a negotiated process with tribes in order to develop standards to look at an independent commission and a single line of authority. It was opposed

by the Department of the Interior. So therefore, it didn't go anywhere. We couldn't even have negotiations because it was opposed.

And again, this is an unusual circumstance. Twice the Secretary of the Interior has been held in contempt. Twice the special trustees have been forced out of their jobs. This borders on a national scandal.

So I appreciate your willingness. Now I'd like to see some action. I'd like to see some specific proposals from the Administration. I'd like to see something that we can work on, either the models that have been introduced or others. Unfortunately, at least in the view of a Federal court judge, that hasn't been happening from the Department of Interior.

Mr. HOMAN AND MR. Slonaker, I again want to express my appreciation to you for doing the job that you did on behalf of people who certainly needed your help. I'm sorry and apologize that your efforts were prevented from being successful for a broad variety of reasons. But it's very unfortunate and the people who really suffer from it are the Native Americans who did not receive what we had hoped would happen when both of you took your jobs.

I thank you, Mr. Chairman.

Senator CAMPBELL. Thank you. Let me mention a couple things in closing. As you know, Mr. Cason, we had a bill that did pass to consolidate lands a few years ago, we did it as a demonstration project with three tribes. It was very successful. All the feedback we got back was that it was working and tribes were ready to have that expanded. There is a bill in now, as you probably know, to expand that. We haven't got it passed yet, but I'm still in hopes that we're going to get that done by the next two weeks. We may not. But it will be one of the things I will try to address when we come back in, because that's part of this whole picture as has been mentioned by all three of you.

I was particularly interested in Mr. Homan's comments about maybe individuals not being represented. Of course, that was my thesis behind offering a way to opt out of this whole class action thing and settle individually, too, which has gotten some attention. Certainly not positive attention by the attorneys, because I think the attorneys for the tribes probably see it as somewhat of a threat and would rather keep it as a class action lawsuit. But there are people actually dying waiting for their money. I think it's time, as Senator McCain does, that we start cutting some checks and getting them the money that they own. It's their money. We haven't been able to do that.

But one thing for sure, they elect their leaders just as our constituents elect ours. And clearly, we can't speak for every single constituent. In my view, you have to go with what you think is the right thing to do. I know that you've made a lot of progress with your last 12 meetings with the tribal task force, and hope you'll continue to make some progress too. But that single issue of the authority of the independent commission seems to be what's holding up most of the progress. I hope we're going to be able to find an answer to that in the next hearing or next meeting or two.

Mr. CASON. Mr. Chairman, if I can comment, there were a couple of other issues that arose at the very end of the process, recently, that have been problematic. One is that our reorganization efforts

and some of the other discussions that we've had with the task force have been sidetracked, perhaps, with some discussions about granting a private right to sue. And the essence of it is a request for the United States to waive its sovereign immunity to lawsuit and to grant private rights of suit. We've had discussions with the Department of Justice about that, and there's been some negative reaction to that. So we haven't found an accommodation on that point.

Senator CAMPBELL. On the private rights to sue, I'm not an expert on this, but the settlement with some of the tragic circumstances of 9/11 in New York, and the Government made an agreement to make a settlement, did they waive their rights to sue after they accepted the agreement?

Mr. CASON. I'm sorry, Mr. Chairman, I don't know about that.

Senator CAMPBELL. Well, I won't pursue that. But I'd be interested in doing that with somebody, some expert in that area.

Mr. CASON. And then there was one other item, which was to include in proposed legislation essentially trust standards. And there was some concern, again expressed by the Department of Justice, about having legislative trust standards at this point. The reason we're in court is that the Department is not performing up to the level of whatever the expectations are, and that trust standards may add another complication to that, in the midst of current ongoing litigation.

So there were several items that were raised at the very last minute that have complicated discussions. From my standpoint, there have been a number of things that I think we can agree on between the tribal representatives and the Department of Interior that we could move forward if we're willing to move the things that we can agree on without it being an all or nothing proposal. And that's what we plan to talk about on Thursday.

Senator CAMPBELL. Well, I want to know what those are at your earliest convenience, those things you agree to. Because we're in hopes that we're going to be able to offer some options at the upcoming national meeting in November, full well knowing some will be for some parts and some against some parts. But at least we'll try to get this thing off dead center to get it moving again. It would be a big help if we could start from the things that we've already agreed to, or can get an agreement to by the time you meet again. So if you would work with our staff, we'd really appreciate it.

Mr. CASON. We'd be more than pleased to do that. And then just as a final comment, Mr. Chairman, this is an opportunity for all of us, that we have all three branches of Government currently focused on the same issue. These problems have been here for a long time. The Department stands ready to do that. We will come up at any time to meet with members of Congress and the leadership to try and work our way through novel, out of the box solutions to this. So we'd be happy to do that, to work with the Committee.

Senator CAMPBELL. Thank you. And Mr. Homan, Mr. Slonaker, the efforts that you've put forth to try to resolve this, it didn't get done, but it wasn't your fault that it didn't get done. You both expended an awful lot of energy and probably got more than a few gray hairs for your work.

I would also invite you to work with our staff, too. I know Senator Inouye is very interested in trying to resolve this, too. And if you could also have some input through staff about what the options that we can offer to try to get this off dead center, I would certainly appreciate it.

Thank you, and thank you for appearing. This committee is adjourned.]

[Whereupon, at 11:43 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR

Thank you, Mr. Chairman and Members of the Committee, for inviting the Department to testify today on the role of the Office of Special Trustee for American Indians (OST) in preparing and implementing a comprehensive plan for the overhaul of the management of Indian tribal trust funds.

In August 2001, the Department identified various issues concerning the trust asset management roles of the Bureau of Indian Affairs (BIA), the Office of Special Trustee for American Indians (OST), and other Departmental entities carrying out trust functions. In response, an internal working group was created.

The internal working group developed a number of organizational options ranging from maintaining the status quo to privatizing functions to realigning all trust and associated personnel into a separate organization under a new Assistant Secretary within the Department. These options were evaluated based on the best method for delivering trust services and other functions to American Indians and Tribal governments.

While this internal review was underway, Electronic Data Systems (EDS) was undertaking an independent, expert evaluation of the Department's trust reform efforts. On November 12, 2001, EDS presented its report "DOI Trust Reform Interim Report and Roadmap for TAAMS and BIA Data Cleanup: Highlights and Concerns" in which it called for a "single, accountable, trust reform executive sponsor."

The Department decided to propose the formation of an organizational unit called the Bureau of Indian Trust Asset Management (BITAM). This option envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau, BITAM. The Secretary believed this newly established Assistant Secretary position would have the needed authority and responsibility for improved trust reform efforts and Indian trust asset management. It became clear early in the Tribal consultation process however that the Tribal Leaders were opposed to BITAM.

At a meeting held on December 13, 2001, in Albuquerque, NM, the National Congress of American Indians (NCAI) proposed the formation of a Task Force charged with providing alternative proposals to the Department on organizational alternatives to reorganize the management of trust services. This included reviewing the role of the OST. The proposal was that the Task Force's purpose would be to evaluate all available organizational options and to submit to the Department one or more alternatives to reform our trust management system.

To further develop an improved reorganization plan and achieve broader consensus, Secretary Norton agreed to the creation of a joint DOI/Tribal Leaders Task Force on Trust Reform.

The Task Force consists of two elected tribal leaders from each region, with a third tribal leader, from each region, acting as an alternate. The cochairs of the Federal team are Deputy Secretary Steve Griles and Assistant Secretary—Indian Affairs Neal McCaleb. They are joined by a number of other senior Department offi-

cials including the Acting Special Trustee and myself Members of the Task Force have spent an extensive amount of time on examining the organizational issues within the Department. The Task Force has earnestly attempted to achieve progress on meaningful trust reform.

The Task Force members created several generic composite options reflecting the best features and major elements from among the 28 alternative proposals submitted by tribes, tribal organizations, and other interested parties. The Task Force agreed to initiate consultations on these options in early June, hold regional meetings throughout June and early July.

On June 4, 2002, the Task Force presented to Secretary Norton its initial report containing its findings and recommendations on the DOI trust organization. The Report recommended that the BITAM proposal be replaced by one of the options advanced, which the Secretary has agreed to do. The report also recommends raising Indian interests to the highest level ever by proposing, as a possible option, the appointment of an Under Secretary to oversee Indian Affairs. In its report, the Task Force wrote that there is a real need for reform and that the status quo is not acceptable. We believe the current system must be improved.

The Task Force presented to Secretary Norton five options for improving the Department's management of Indian trust assets. From among them, the Task Force recommended the options of creating a new Deputy Secretary for Indian Affairs, creating a different organizational subdivision at the BIA Level, and a composite of the two which envisions the creation of an Under Secretary of Indian Affairs and the grouping of BIA functions into logical units. During Task Force meetings, some Task Force members have expressed interest in an organizational structure that phases out the Special Trustee.

The Task Force held meetings in Portland, OR, in July, and Anchorage, AK, in August to consider these options further. Unfortunately, as you are aware, we reached an impasse with regard to legislation implementing pieces of these options early this month on matters that were not related to organizational alignment.

The effort that we have put into this consultation process is an indicator of its importance to the Department. The Department is firmly committed to finding an effective, equitable solution for improving the organization and management of Indian trust assets, both tribal and individual. Indian country deserves real reform, and the Secretary is committed to this goal. Any proposal we ultimately come up with will not have 100 percent support, but we are dedicated to improving the system, to fairness, and to ensuring that future generations of American Indians will inherit a trust management system that provides accountability to individuals and tribes. This concludes my statement. I will be happy to answer any questions the Committee may have.

PREPARED STATEMENT OF PAUL M. HOMAN, FORMER SPECIAL TRUSTEE FOR
AMERICAN INDIANS

I am grateful to the committee for the opportunity to present testimony on the role of the Special Trustee within the Department of the Interior.

The Failure of the Department of the Interior to Reform American Indian Trust Fund Management Programs and the Role of the Special Trustee

On September 19, 1995 I was appointed the first Special Trustee for American Indians and served in that capacity until January 7, 1999 when I resigned rather than accept the reorganization of the Office of the Special Trustee set forth in Secretarial Order 3208 dated January 5, 1999.

The Order was the last of a series of Department of the Interior (Department) decisions taken over my tenure as Special Trustee to usurp the powers, duties and responsibilities vested in the Special Trustee, The Office of the Special Trustee (OST) and the Advisory Board by the American Indian Trust Fund Management Reform Act of 1994 (Reform Act). For all practical purposes the cumulative effect of these Departmental actions and policies deprived the Special Trustee, the Office of the Special Trustee and the Advisory Board of the independence and the authority that was intended by the Reform Act and the resources, principally managerial resources, necessary to carry out the duties and responsibilities of the Special Trustee and the Office of the Special Trustee.

Since the Reform Act was passed in 1994, the Department's record regarding the role of the Special Trustee in trust management reform demonstrates over and over again that the reform efforts of OST were under-funded, under-staffed, delayed and otherwise frustrated in favor of higher Departmental priorities. The Reform Act was fundamentally flawed in one important respect in that it failed to provide the Special Trustee, the Office of the Special Trustee and its Advisory Board with the inde-

pendence and the authority to carry out the purposes of the Act. More important, over the objections of the Special Trustee, the Department has failed to address the primary cause of the longstanding trust management problems: the mismanagement and neglect inherent in the Bureau of Indian Affairs, the resolution of which is required before any meaningful reform can be implemented. The result has been a near complete failure to date in bringing about any effective reform of the Man trust management activities of the Department and the Bureau of Indian Affairs.

In 1997, as Special Trustee, I filed a strategic plan with the Secretary of the Interior (Secretary), OMB and the Congress as required by the Reform Act of 1994. As required by the Act, the submission was "a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities." I wish to reaffirm a few points I made in testimony at the time as I believe, with a few exceptions, problems with the trust management systems and the prospects for reform are much the same today as they were then. Since my departure in 1999, I have followed court filings, Congressional hearings and other public reports on Indian trust reform with a great deal of interest and have some more current observations as well.

The Primary Problem with Trust Reform and the Government's Failure to Deal with It.

The problems in the trust management systems are longstanding ones. Mismanagement and neglect have allowed the trust management systems, record keeping systems and risk management systems to deteriorate over a 20 to 30 year period and become obsolete and ineffective. For many of those years, including many years since 1990, the trust programs were seriously under staffed and under funded. The result was that the government increasingly was unable to keep pace with the rapid changes and improvements in technology, trust systems and prudential best practices taking place in the private sector trust industry. This gap will continue to increase until the reforms outlined in the Strategic Plan are funded and implemented.

If recent filings by the Special Master and the Court Monitor in the IIM litigation (*Cobell v. Babbitt*) are indicative of the current situation, that gap has not been closed and the prospects for a timely solution are not very good.

There are two contributing factors and one primary cause of the mismanagement and neglect that have contributed historically to the Indian trust management problems:

Contributing Factors to Trust Mismanagement and Neglect

1. One of the historical factors impacting the trust management problems can be attributed to the trade-offs of financial and managerial resources which take place at every level of government between trust management activities (trust resource management, trust funds management and land title and records management) and other activities and programs of the Bureau of Indian Affairs, the Department of the Interior, the Administration and the Congress. History has consistently shown these politically expedient government tradeoffs of competing financial and managerial resources to be adverse and detrimental to the effective and proper administration and funding of the trust management activities.

These trade-offs have been made and are continuing to be made even in the face of a long history of court cases, that have consistently held the trust relationship between the United States and the American Indians to be a distinctive one. Decisions of the Supreme Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

2. Another important factor contributing to trust management problems is the way the BIA is organized and manages trust management activities. The BIA's organizational alignment causes decisionmaking and management for Individual Indian Money (IIM) and Tribal issues to be an intricate and complex coordination process and an ineffective one at times.

Primary Cause of Trust Mismanagement and Neglect

The primary cause of the longstanding trust management problems is lack of competent managerial resources to manage effectively and efficiently the trust management responsibilities to American Indian beneficiaries. Managers and staff of the Department and the BIA have virtually no effective knowledge or practical experience with the type of trust management policies, procedures, systems and best practices that are so effective, efficient and prevalent in private sector trust departments and companies. The BIA area and field office managers do not have the background, the training, the experience, and the financial and trust qualifications and skills,

necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. Thus, and through no fault of their own, and even assuming adequate financial and retraining resources were made available, they are not capable of managing effectively and efficiently the Federal Government's trust management activities on a par with that provided by private sector institutions to their trust customers.

The lack of trust managerial competence and the lack of financial trust orientation and focus throughout the BIA and the Department of the Interior have been institutionalized over many years and are now inherent in the BIA organizational culture. It is the reason in large part:

A. Why the BIA has never originated meaningful reforms of the trust management processes in the last 30 years.

B. Why the BIA has resisted and ultimately failed to implement nearly all of the meaningful reform efforts attempted in the last 30 years.

C. Why a new organizational structure, new management and massive retraining are necessary for the future management of the Federal Government's trust responsibilities to American Indians and the management of the implementation of the reforms identified in the Reform Act of 1994.

For over 20 years knowledgeable and informed professionals have called the Bureau of Indian Affairs the worst managed agency in government. Every outside study, indeed, most internal studies I researched as Special Trustee agreed with that conclusion.

My own research while Special Trustee led me to conclude that the vast majority of upper and middle level management at the Bureau of Indian Affairs were incompetent and could not be retrained to manage the trust management activities on a par with that provided by private sector institutions to their trust beneficiaries. It was also my conclusion that the natural starting point for any reform effort designed to address mismanagement and neglect should be the removal of incompetent middle and upper management at the BIA and at the Department. It is axiomatic in private sector restructuring that if management is the problem, management must be removed and replaced if restructuring and reform is to be successful. This formula was used successfully in all five of the financial institution resolutions I participated in and managed while in the private sector. The formula is used over and over again in the restructuring and resolution of countless public and private institutions in "extremis". Surely, no objective observer can doubt that the Bureau of Indian Affairs has been in "extremis" for sometime. Nevertheless, as well-known, clear and practical a remedy as this is, I also observed that in previous reform efforts over the last 25 years, no senior manager at the Bureau of Indian Affairs or Department had been removed for incompetence. In addition, every reform effort in the last 25 years had been left largely in the hands of the very same incompetent BIA managers who contributed to the problem in the first place.

While Special Trustee, I became convinced and still believe that the Department did not and does not have the will to address the "mismanagement" issues and force out the incompetent managers, nor was and is the Department likely to attract competent managers willing and able to undertake a timely reform effort within the Department of the Interior. Without both, no reform effort can succeed. I therefore recommended to the Secretary of the Interior in the 1997 Strategic Plan that the Department should support the establishment of an independent agency, outside the Department of the Interior, to manage the Indian trust management activities and the reform effort. The Secretary instead opted for the Department's historical approach to reform and decided that any reforms would be undertaken solely by the Department of the Interior. Again, in August 6, 1997, I recommended that the reforms being considered in what later became the High Level Implementation Plan not be left largely in the hands of the Bureau of Indian Affairs. The Secretary again opted for the Department's historical approach and decided in favor of the BIA's managing most of the reforms of the High Level Implementation Plan.

The Department currently is using the same basic historical approach to reform, apparently with as little success as the previous Administration. Recent court filings in the IIM Litigation indicate just how unsuccessful the High Level Implementation Plan and successor reform plans have been. Based on these filings, just last week on September 17, 2002, U.S. District Judge Royce C. Lamberth held Secretary of the Interior Gale A. Norton and a senior aide in contempt of court for deceiving him about the agency's failure to reform the trust fund activities. He found four instances where Secretary Norton and Neal McCaleb, assistant secretary for Indian affairs, had committed fraud on the court, and the judge held them in contempt for failing to abide by a 3-year old court order to begin major reform of the trust. Just a few findings from Judge Lamberth's 267 page opinion reinforce and support some of the points I made above but in much stronger and more eloquent terms:

“The agency has indisputably proven to the court, Congress, and the individual Indian beneficiaries that it is either unwilling or unable to administer competently the trust,”

“Worse yet, the department has now undeniably shown that it can no longer be trusted to state accurately the status of its trust reform efforts. In short, there is no longer any doubt that the secretary of the Interior has been and continues to be an unfit trustee-delegate for the United States.”

“the Individual Indian Money trust has served as the gold standard for mismanagement by the Federal Government for more than a century. As the trustee delegate of the United States, the Secretary of the Interior does not know the precise number of IN trust accounts she is to administer and protect, how much money is or should be in the trust, or even the proper balance for each account.”

Circumstances Warrant an Alternative Structure Outside the Department of the Interior to Reform BIA and the Indian Trust Management Programs.

Managerial incompetence, mismanagement and neglect in the Department’s management of the Indian trust management activities are rampant and have resulted in conditions that are unacceptable by any reasonable standards and continue to do significant harm and damage to American Indian trust beneficiaries. They have also caused permanent damage to the core trust management systems the government uses to manage the Indian lands and moneys. These defective systems prevent the government from meeting the fiduciary, accounting and reporting standards required by the American Indian Trust Fund Management Reform Act of 1994 and standards of ordinary prudence applicable to all trustees, public or private. This serious breach of trust exposes the government to liability and loss that compare to the exposure and losses the government experienced in resolving some of the largest bank and thrift failures during the financial crisis of the late 1980’s and early 1990’s. Until “mismanagement” issues are addressed at the Department and Bureau of Indian Affairs, no meaningful reform can take place and the government’s exposure to loss and liability to American Indian trust beneficiaries will continue to escalate.

The record shows and I believe that the Department does not have the will or ability to address the “mismanagement” issues and force out the incompetent managers at BIA, nor is the Department likely to attract competent managers willing and able to undertake a timely reform effort within the Department of the Interior. Without both, no reform effort can succeed. In the circumstances, alternative reform structures managed and implemented outside the Department of the Interior should be considered by the United States, the ultimate trustee of the American Indian trusts.

In their present circumstances and condition, if the Indian trust management activities managed by the Department and the Bureau of Indian Affairs were housed in and managed by a private sector financial institution, that institution would be declared “bankrupt”, management and staff would be removed and replaced and a responsible successor trustee would be appointed by the same government that is allowing the Indian breach of trust to continue. While considered “extreme” by some, this is a common public and private sector remedy for bankrupt institutions and one that should be considered in reforming the bankrupt Bureau of Indian Affairs.

The U.S. Government itself used this so-called “extreme” remedy over and over again from 1980 through 1994 when the financial institution crisis resulted in 2,912 failed or assisted financial institutions. The FDIC and/or Resolution Trust Corporation (RTC) gave government assistance in resolving each of these institutions, such that over 99 percent of depositor beneficiaries (insured and uninsured) received 100 percent of their deposit balances in cash. In every major case, the government required senior management and staff of the failed or assisted institution to resign before it provided government assistance to depositors, creditors and successor financial institutions. The government’s exposure to liability and loss as a result of its continued breach of trust in managing the American Indian trusts is at least equal to the exposure to loss created by many of the largest bank and thrift failures and should be addressed with the same urgency that the government used in resolving the financial institution crisis of the early 1990’s.

The BIA’s mismanagement of the Indian trusts, particularly as regards records management, asset management and accounting have exposed the government to liability and loss, the magnitude of which also compares to losses and accounting deficiencies at WorldCom, Global Crossing, Enron and Arthur Andersen. Management has been fired at each one of those bankrupt institutions and most of the staff will

lose their jobs. None will survive their bankruptcies with a structure anything like their pre-bankruptcy structure.

It is time for the Federal Government to consider a reform resolution for the Department and BIA along the lines used to reform failed financial institutions or large bankrupt corporations, especially in light of the fact that the Department has failed to reform from within. As a result, such a so-called "extreme" remedy seems warranted for the BIA before the government's exposure to loss escalates further as a result of the continued breach of trust.

Recommendation

The history of numerous Indian trust reform efforts over the last 30 years has shown that the Department of the Interior is unwilling and unable to implement the types of reforms and management changes necessary to manage the Government's trust management activities according to the exacting fiduciary standards required in today's modern trust environment. It is for this reason that I recommended in the 1997 Strategic Plan and to the Secretary in 1997 and recommend now that Congress consider establishing an independent government sponsored enterprise to manage the U.S. Government's trust management responsibilities to American Indians and American Indian Tribes for trust resource management, trust funds management and land title and records management according to the most exacting fiduciary standards and moral obligations of the highest responsibility and trust.

History and Performance of the Office of the Special Trustee

From the inception of OST in September 1995, neither the Special Trustee nor the Office of the Special Trustee had direct authority under the Reform Act of 1994 to initiate reforms or to implement those trust management reforms that were approved following the filing of the Special Trustee's strategic plan in April 1997. Nor did the Secretary elect to vest the Special Trustee and the OST with the direct authority to implement the reforms except at the Office of Trust Funds Management (OTFM) that has reported to the Special Trustee since February 1996. Instead, the Special Trustee and the OST were limited to oversight of the vast majority of the reform efforts that were to be implemented in the same manner as previous unsuccessful reform efforts, i.e., directly by the Bureau of Indian Affairs (Bureau) and other affected units.

During the 1996 to 1999 period, the record shows a dramatic difference between the very successful reform results achieved by OST directly at OTFM; the minimal results achieved through oversight of the Bureau's reform efforts; and the negative results achieved through oversight of the Department's record keeping reform efforts.

On July 31, 1998 the Secretary of the Interior approved the High Level Implementation Plan (BLIP) which, in his view, provided the structure through which the Department could accomplish the successful resolution of the many decades-old Man Trust Funds problems. Of 13 sub projects, OST had direct line responsibility for only 2 sub projects: Individual Indian Money (IIM) and OST data cleanup and the trust funds accounting system (TFAS) used for both IIM and tribal accounts. OST had started planning for these two tasks in 1996 and was able to begin implementation in 1996 and 1997 despite the limited managerial and financial resources which were made available by the Department. When Congress approved significant funding for 1998, OST and OTFM were able to show excellent results as reflected by the BLIP progress reports that have been made public.

The implementation of the trust funds accounting system by OST also was a successful reform effort. After being held up by the Department for over 1 year, OST in 1998 obtained all necessary approvals, awarded a TFAS contract, conducted a successful pilot and had implemented the system ahead of schedule. It is the only trust accounting system to have had any success in the reform of the Indian trust management systems.

On the other hand, concerns over the BIA's data cleanup and systems efforts were relayed in writing to the Secretary by OST as early as July 1998 and for this reason the Special Trustee did not recommend approval of the Bureau's part of the BLIP. Public and litigation filings to date show that the seven sub projects that were to be implemented principally by the Bureau of Indian Affairs were not implemented by the Secretary's imposed deadline of year-end 2000. The Department still has not been successful in bringing about material reform. Records cleanup has been inadequate. Systems design and implementation of asset management and ownership systems plans substantially failed. The Bureau's record to date in this reform effort mirrors its historical failures to manage and implement meaningful reform. The Department is now estimating that it will take at least until 2005 to implement still another reform plan being proposed by the Department. Given its historical record,

I have no confidence that any reform effort managed by the Department will be successful.

An even larger threat to the overall reform effort is the Department's continued inability or unwillingness to address the fundamental trust record keeping problems and systems that account for the vast majority of the Indian trust management operating and accounting problems. For this reason, during my tenure as Special Trustee, the Special Trustee and OST, in their oversight capacity, presented several comprehensive plans to bring the Department's trust account records management function up to the standards that would govern a commercial trustee. None of these efforts were accepted and the HLIP gave no definitive guidance on the issue. For this reason the Special Trustee noted to the Secretary on July 31, 1998:

Since a joint Indian trust records management solution is fundamental to the successful implementation of the other Sub-Projects of the high level implementation plan and since all affected Bureaus have not yet agreed on a solution, the high level implementation plan being presented for surname and your approval will not in my opinion enable the Department to comply with the Reform Act and the Secretary's Agreement dated August 22, 1997.

To my knowledge there is still no records retention policy that meets commonlaw trust standards, a condition precedent for any adequate trust records management system. Nor is there a records management system to retain trust documents, keep records and furnish information, sufficient to provide an accounting to the beneficiaries or to meet the accounting, accuracy and reporting requirements of the Reform Act of 1994. The Department's failure to address and resolve the trust record keeping problems jeopardizes the entire reform effort. Without the accurate records required by the Reform Act and commonlaw standards, systems improvements planned for trust fund accounting, asset management and land title and records will be ineffective and will not permit the Department to comply with the accounting, reporting and accuracy standards required by the Reform Act of 1994.

In 1999 the Department was criticized and sanctioned for ongoing mismanagement and neglect of the Indian trust records. The Secretary and the Assistant Secretary in charge of the Bureau of Indian Affairs were held in civil contempt of an U.S. District Court's document production orders. The case (*Cobell v. Babbitt*) underlying the contempt proceeding is essentially a trust administration action in which the Indian beneficiaries seek an accounting. The court has not to this point in the case addressed the detailed statutory and commonlaw trust duties owed by the government as trustee to the individual Indian beneficiaries. Nonetheless, the court noted "it is basic hornbook law that the trustee has the duties of retaining trust documents, keeping records, furnishing information to the beneficiary, and providing an accounting." The court further noted: "the court will appoint a special master to oversee discovery, document production, and related matters and to effectuate compliance with this court's orders. The defendants simply cannot be trusted to do this job themselves." If recent filings (2001 and 2002) by the Special Master and by the Court Monitor in the IIM Litigation are indicative of the present situation, the Department still cannot be trusted to do this job.

The Performance of the Office of the Special Trustee

The recent record of the Department and the Bureau of Indian Affairs in planning and implementing trust management reform is only the most recent demonstration of their historical failures to bring about meaningful trust management reform. There has been some success, notably the progress of OST and OTFM in cleaning up the IIM records, in implementing a new trust funds accounting system and in the administration of OTFM. These modest successes demonstrated that significant reform is possible when an office has the responsibility, the authority, the independence and the financial and managerial resources to carry out the reform. As noted, The Reform Act of 1994 called for a Special Trustee and an OST to oversee the reform effort but with no direct authority to ensure that the purposes of the Act were carried out. The Act was flawed in that respect. Despite aggressive oversight activities by the Special Trustees and OST over the last several years, the oversight efforts proved largely ineffective in ensuring that the Department complied with the Act. In this respect, the OST can be chalked up as another failed reform vehicle. On the other hand, the OST's lasting contributions were in further exposing the Department's Indian trust management deficiencies, in keeping these issues before the Congress, the Judiciary and the public and in proposing permanent, practical solutions to these longstanding problems. In addition, OST was often the only voice in government representing the interests and concerns of the American Indian trust beneficiaries who are entitled to and deserve the best possible management of the

Indian trusts by the trustee. If such efforts eventually lead to the substantial resolution of the Indian trust management issues, OST can be counted a success.

PREPARED STATEMENT OF THOMAS N. SLONAKER, FORMER SPECIAL TRUSTEE FOR AMERICAN INDIANS

Thank you, Mr. Chairman and members of the committee.

I very much appreciate the opportunity along with Mr. Homan, the first Special Trustee for American Indians, to discuss with you the issues that have impacted the Special Trustee since the position was created pursuant to the 1994 American Indian Trust Fund Management Reform Act ("1994 Act").

The Senate confirmed me in late May 2000 as the second Special Trustee. I served through the end of the Clinton administration and was held over by President Bush. I then served briefly as the Acting Secretary of the Interior until Secretary Norton was herself confirmed and continued thereafter as the Special Trustee until I was asked by her to resign in late July of this year. I had left retirement following 36 years of private sector trust and banking experience to undertake the Special Trustee's responsibilities.

The Government's Indian Trust Obligation

It is important to note that the nature and scope of the Federal Government's overall obligations in the area of Indian affairs is complex and reflects a history dating nearly to the establishment of the United States. The 1994 Act, however, addresses a discrete part of those obligations, the Indian trust assets, as that term is defined in the Secretary's Principles for Managing Indian Trust Assets. As trustee the government holds assets (mostly land) for some 300 tribes and approximately 250,000 individual Indians assets for identifiable beneficiaries. *Like every other trustee, the Government trustee is required to know at every moment what assets are held in trust, how those assets are invested and managed, and to whom the proceeds of that management belong and are to be paid.*

The Government's fiduciary duties with respect to the Indian trust assets it holds are separate and apart from the government's treaty obligations to the numerous individual tribes. The Secretary's fiduciary relationship exists directly between the Secretary as trustee-designate and the tribal or individual beneficial owner. The Secretary's trust responsibility, as set forth in the *Mitchell II* decision of the Supreme Court as well as the 1994 Act itself, is essentially equivalent to the role of a private trustee, and is guided by the "rules that govern private fiduciaries". The trust responsibility of the government requires the use of a system of motivating concepts and principles very different from those used in the discharge of political, statutory or contractual obligations.

The Role of the Special Trustee

In essence, the 1994 Act provides that the Special Trustee would monitor the historical accounting and oversee the reform of the trust process for the benefit of tribal and individual Indian beneficiaries. In doing so, the Special Trustee would be responsible to the Secretary of the Interior and at the same time provide reports to the Congress on the progress of these efforts. Essentially, the Act requires the Special Trustee to provide the transparency necessary for the benefit of the Congress as well as for the Secretary.

The *Cobell* class action litigation subsequently led to court-mandated reporting to it by the Secretary on the progress of trust reform. As part of that effort, the Special Trustee—who for a while compiled the report on behalf of the Secretary and the Department—also provided his observations on the progress of trust reform for the benefit of the court. Both Congress and the court, therefore, have looked to the Special Trustee to provide that transparency for measuring progress toward trust reform.

Obstacles to the Special Trustee in Carrying out His Duties Under the Act

The Special Trustee was not provided under the law with any direct, line management of the trust reform. An exception to this was the transfer by then Secretary Babbitt in 1996 of the Office of Trust Funds Management (OTFM) from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST). In my view and that of others, OTFM became the model for a fully functioning organization among those trust reform projects the Department has undertaken.

The Special Trustee sought line authority over all aspects of trust reform and, therefore, over those fiduciary trust activities spread across the BIA and parts of the Minerals Management Service, the Bureau of Land Management, and other organizations within Interior. Instead, in mid-2000 Secretary Norton provided the

Special Trustee with “directive” powers, that is., an ability to order changes for trust reform where needed change was not being made by organizations within the Department. The directive power granted by the Secretary, when used, was subject to an appeal to the Secretary by the affected trust individual or organization, but worse, as witness a directive issued by the Special Trustee last year, subject to prolonged bureaucratic delay. This was not a workable answer for effective organization change.

The Bureau of Indian Affairs’ middle management ranks, along with some tribes, are seemingly adamant in their opposition to a separate organization, even a separate chain of command, to promulgate the government’s fiduciary responsibilities. Interestingly enough, the current Secretary late in 2001 proposed a plan (named BITAM) whereby the entire trust responsibility of the Government would be placed into a new and separate organization within Interior, withdrawing and consolidating fiduciary trust functions from the BIA, OST and other parts of the Department. The Special Trustee applauded that proposal as potentially achieving the separate chain of command and the requisite *accountability* for properly carrying out the trust responsibility. I testified on February 6, 2002, before the House Resources Committee on the Secretary’s proposal as follows:

I concur with the Secretary’s concept of a single organizational unit responsible for the management of the Indian trust assets. That organization has the potential of addressing the accountability concerns by placing one executive, responsible to the Secretary, in charge of the delivery of the appropriate, required trust services to tribes and individual Indians. I believe a single organization with its own chain of command, that is, not diluted by intersecting other Departmental chains of command, can work better than the present arrangement. *The devil, however, is in the details, and the new organization must have the right executive direction and actually hold people accountable.* (Emphasis added)

You cannot continue to assign the task for overhauling trust reform to the same people and organizations that have failed in that assignment before.

The tribes often can be an obstacle to trust reform: In the lengthy tribal consultation process that followed the Secretary’s proposal announcement, it became quite clear that the tribes—themselves beneficiaries of the Trust—did not want the fiduciary trust function removed from the BIA at all. Nor did they even want the regional directors and agency superintendents removed from the fiduciary trust chain of command—an essential separation to eliminate potential conflicts of interest with the trust beneficiaries and assure dedication to the trust obligation.

The consultation meetings also highlighted another often-misunderstood aspect of the Indian trust responsibility: The trust responsibility is really *two* categories of responsibilities. One can be labeled as the “fiduciary” trust responsibility that refers to the duty to account for the trust assets (land and moneys primarily) that in turn provide income to the beneficiaries. The other trust responsibility is a broader one derived from treaty and law, and is the obligation of the government relative to providing social services, education, roads, police protection, etc. to Indian tribes and individuals—the non-fiduciary trust duties, if you will. The fear on behalf of the tribes appears to be that the BIA may be gutted by withdrawal of the *fiduciary* responsibilities and, thus, somehow the honoring of the *broader* trust responsibility may be jeopardized.

Thus, the dilemma facing the Secretary is this. On the one hand, in order to accomplish *fiduciary* trust reform, the strong management and accountability that are required are best accomplished by a separate organization for fiduciary trust within the Department, or even better, outside the Department altogether. On the other hand, such separation of trust responsibilities appears to be alien to many tribes. As-is often heard, the tribes seem to have trouble living with the BIA, but are reluctant to be without it. It is also apparent, incidentally, that to date *individual* Indian beneficiaries don’t have much of a voice in the consultations nationally.

The Special Trustee should be embraced by the Secretary to assist him or her to direct reform and effect change. Surprisingly that has not happened. The reason for that resistance by the Secretary appears to be the reluctance to tolerate the transparency of actual trust reform progress, presumably because such candor may complicate the Secretary’s effort to defend against the current “show cause” litigation in the contempt trial. Furthermore, the Special Trustee has not been perceived as “a part of the team” when he has been obligated to respond honestly on the state of trust reform to Congress—and the Court. In fact, the Special Trustee in at least recent months has often been excluded from trust reform meetings with the Secretary and most senior Department officials. It appears, instead, that the intent of the Department management is to isolate the Office of the Special Trustee.

Another obstacle to trust reform and to the Special Trustee has been the attempt to diminish the standard of the government's trust duty itself. For whatever reason—litigation or otherwise—there appears to be considerable reluctance in both the last and the present administrations to acknowledge the high standard of trust duty required of the government as the Trustee under various laws and Supreme Court decision—even to include the Secretary's Trust Principles in the Department's manual. In testimony to this Committee this year, the administration has not defined the government's trust responsibility when requested and instead looks to the possible weakening of the trust duty by the Supreme Court with the two trust cases before it now.

Recommendation

There is no reason that the Department—with the Secretary's leadership—cannot recognize and demand compliance with the trust duty. There appears to be no political will to ensure compliance with the government's trust obligation.

Only a single, direct line chain of command for all personnel supporting the trust activities has a chance of succeeding. Only the Special Trustee with her/his legal responsibility, trust experience and Congressional obligation is best positioned to exercise the required authority on behalf of the Trustee-designate, but the Special Trustee's position doesn't have that line authority.

In my opinion, the Department is incapable of executing trust reform and, indeed, even knowing what and how to do so, or to provide the experienced, competent people resources needed in many cases. More than being incapable, there is often a seeming unwillingness to adhere to the trust principles of the 1994 Act and the Department's own manual, *as well as to hold people accountable for their actions with consequences for poor performance.*

I have come to the conclusion, therefore, that it is important to have a strong oversight role *outside* the Department, responsible to the Congress, and headed by an experienced trust management executive advised by a board of trust experts and Indian leaders. In a sense, this is the Office of the Special Trustee as established by the 1994 Act—but placed outside the Department. This executive oversight position and the attendant organization need to have the ability to require change when needed changes by the Department itself are not forthcoming.

There are some instructive models available in the form of government-sponsored enterprises that have addressed issues of public policy in other venues such as the failures of many savings and loan institutions a few years back. Such outside authorities can provide for eventually returning the trust operations to the Department at such time as the systems, procedures, records, and the leadership are ready and the Department exhibits the ability to carry on with the fiduciary trust responsibilities.

Thus, in my opinion, trust reform is never going to happen until there is an authority *outside* the Department that can compel compliance with the government's trust duty and demand accountability. The most recent decision of the DC District Court, which stopped short of appointing a receiver, hopefully will enforce the enactment of trust reform. That solution will succeed only, in my opinion, if the Department is forced to comply with needed change.

Thank you, Mr. Chairman and members of the committee, for the opportunity to present these remarks today.